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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

NO. 728

UNITED STATES OF AMERICA, Petitioner

v.

T. M. and JOSEPHINE S. EVANS, Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in the case of bonds having alternate call prices, the amount of the amortizable bond premium is to be computed only with reference to the price at which such bonds are callable at the option of the borrower or, as was held by the courts below, with reference to lower prices at which the bonds must be called under certain conditions?

ARGUMENT

The decision in *Estate of A. Gourielli v. Commissioner*, 289 F. 2d 69 (C.C.A. 2d), which was argued in this Court on February 27, 1962, *sub nom. Hanover Bank v. Commissioner* (No. 224), turns upon the Second Circuit's finding of the unlikelihood of the bonds there involved being redeemed by a "special" call during the year 1953. The opinion by Judge Friendly makes this clear:

> "... We likewise hold the additional deductions claimed by the taxpayers may not be taken *on the facts here* ..." (289 F.2d 69, 70) (Emphasis supplied)

> "... Whether a bondholder might be entitled to use a 'special' redemption price for computing bond premium if there were circumstances indicating the likelihood of a substantial call at that price when he first elected a method of amortization, or whether, having elected to amortize to a 'general' call price, he might be permitted a further deduction for amortization if facts indicating the likelihood of such a call at the 'special' price later appeared, we do not find it necessary here to decide." (289 F. 2d 69, 74-75)

This basis of decision is inconsistent with the adoption of a general rule not dependent on the probability or improbability that particular issues of bonds will be redeemed during a particular year. If there is to be a general rule, as Government and taxpayer both agree should be the case (Respondent's brief in *Hanover Bank v. Commissioner* (No. 224) at page 16), that rule must permit amortization to the special call price. This is clear

from the opinion in the Third Circuit in the instant case. Judge Goodrich, having first decided that "both Government and taxpayer will be better off with a general rule" (295 F. 2d 713, 716), rightly concludes that an allowance based on the special call price is the fair and proper rule, and the only rule that can be applied consistently. He said:

> "With complete deference to the Second Circuit opinion, we are going to take the other view and uphold the district court in its allowance of the deduction based on the special call price. We have testimony from the plaintiff's expert that in the three months prior to the hearing of this case there were seven special calls of public utility bonds and no general calls. There was also testimony, not necessarily convincing in reaching a result, that if there were any calls to be made during 1954 and 1955 they would have been made at the special call price. The taxpayer's expert also testified that the special call price is usually the price at which the offering is first made to the public. An examination of Standard and Poor's Bond Guide for 1954 and 1960 shows that in those years special calls were numerically more frequent than general calls and that a substantial dollar amount of bonds was called specially in both years. It seems to us that these factors are significant in supporting a conclusion that an allowance based on the special price is a fair one and one which the taxpayer would expect to have happen." (295 F. 2d 713, 716)

CONCLUSION

The Petition for a Writ of Certiorari should be denied if the Court concludes in the *Hanover Bank* case (No. 224) that the right to amortize to the "special" call price is not to be determined case by case according to the likelihood of redemption by special call. Even if the decision in *Hanover Bank* requires an affirmance on the facts there, the Petition should also be denied, in view of the findings in the instant case by the District Court and the affirmance of those findings by the Third Circuit.

Respectfully submitted.

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